

24

January 14. 1772.

Unto the Right Honourable the Lords of Council and Session,

21st Jan 1772
J. C. C.

19th June 1772.
adhere.

Hence, impossible if
 could be really gotten
 now hands balance 57
 him & because he
 interviewed my Pelham
 seems a person full of
 energy & ^{power} ~~power~~ ^{power} ~~power~~
 very little. I ^{suppose} ~~suppose~~ ^{suppose} ~~suppose~~
 or with it, ^{suppose} ~~suppose~~ ^{suppose} ~~suppose~~
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 purpose ^{suppose} ~~suppose~~ ^{suppose} ~~suppose~~
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^{suppose} ~~suppose~~ ^{suppose} ~~suppose~~
 having a great & large
^{suppose} ~~suppose ^{suppose} ~~suppose~~
 hard & necessity of ^{suppose} ~~suppose ^{suppose} ~~suppose~~
 now & occasion to study~~~~

2. 1744: recall the new, with
 end of ^{suppose} ~~suppose ^{suppose} ~~suppose~~
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 condition, also for it
 authority, it ^{suppose} ~~suppose ^{suppose} ~~suppose~~
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 intention of it, ^{suppose} ~~suppose ^{suppose} ~~suppose~~
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^{suppose} ~~suppose~~ ^{suppose} ~~suppose~~
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Jan. 1764

Where. no
extension; subject
to modification

Humbly sheweth,

THAT the deceased Patrick Smith, mason in Kilmarnock, was debtor to your petitioner in L. 100 Sterling, by bond dated the 2d of March 1744; and as it cannot be disputed, that advancing so considerable a sum to one in Smith's circumstances, was a great favour done him, so the fact is, that by means of this money, Smith was enabled to fit up and furnish a public house, large, commodious, and for many years the best inn in the town of Kilmarnock; and as he was to all appearance in pretty good circumstances, your petitioner did not distress him for payment of this bond, but allowed it to lie over till his death, which happened in January 1764, never doubting but the money would be thankfully repaid him.

Upon Patrick Smith's death, however, matters cast up under most unexpected, strange, and suspicious appearances. Janet Smith, his only child, and Robert Armour mason in Kilmarnock, her husband, had, according to your petitioner's information, assumed to themselves an universal administration of all Patrick Smith's affairs; the key of the desk in which his papers lay was in Robert Armour's pocket; and a discharge and renunciation of an heritable bond, to which Janet Smith had right as heir to her mother over some subjects in Kilmarnock, purchased by her father, and over

which your petitioner had an heritable bond from her father, and which renunciation your petitioner was well informed was amongst Patrick Smith's papers, was unhappily amissing; and the effects of the defunct were so abstracted, that your petitioner had but a very bad prospect of getting payment of his bond.

Your petitioner being a very old man, and one who could never so much as sign his name, or read the hand-writing of any person whatsoever, was very unable to take proper steps to secure his own interest. He for some time was induced to concur with Janet Smith and her husband in certain measures, which he has since had too much reason to repent. Your petitioner was all along anxious to avoid disputes, willing to agree to any thing that was reasonable, and to take from Patrick Smith's representatives what he could peaceably get. He impowered the Reverend Mr *John Dun* minister of the gospel at *Auchinleck*, who was married to his niece, to meet with Robert Armour, and Bailie David Brown merchant in Kilmarnock, his friend, in order to settle accounts in an amicable manner. Mr Dun, who was very desirous of preventing a poor old man from being engaged in a law-suit, the expence and vexation incident to which would by no means be suitable to him, used his best endeavours to bring about the desired effect, considering his interposition as a humane and benevolent office: but Mr Armour was either so wrong-headed, or so ill advised, as to decline a friendly accommodation; and therefore your petitioner found himself under the necessity of commencing a process against the said Janet Smith, and Robert Armour her husband, for his interest, concluding that they should be found liable in payment to him of the bond due by the deceased Patrick Smith, with annualrents, &c. as having incurred one or other of the passive titles known in law.

This action came before the Lord *Auchinleck* Ordinary; and a most strenuous opposition was made to it by the defenders, who wanted if possible to stifle it *in limine*, being conscious of their very unwarrantable behaviour, and justly apprehensive of the consequences. The Lord Ordinary, however, was pleased to allow a conjunct probation to both parties. Your petitioner, as has been already observed, being a very old man, and very ignorant of the transactions which gave rise to the process, was advised to take his proof as broad as might be; and although he was not so successful in bringing to light the various machinations of the defenders, yet he flattered himself, that, notwithstanding all their art and concealment,

ment, he had proved what was fully sufficient *ad victoriam causæ*; as your Lordships, it is hoped, will see from the following abstract.

Margaret Macgregor, relict of the deceased Patrick Smith mason in Kilmarnock, depones, p. 2. A, "That in a few days after her husband was buried, the deponent took out of his house what furniture she had brought with her at her marriage, and which she apprehended belonged to herself, in presence and *by the consent of Robert Armour the defender*, Bailie William Gregory, brother to the deponent, and Bailie David Brown merchant in Kilmarnock; and the deponent believes, *the residue of said furniture was roused or intromitted with by Robert Armour*; but does not know by what warrant, or what part of it was roused. Depones, *That she knows that Robert Armour the defender got the defunct's body-clothes, which were lying in the deponent's press, and which she threw out upon the floor to him, with what napery and sheets and shirts belonged to her husband: That the number of sheets were three pair, partly coarse and partly better: That there was another pair of sheets which the deponent sold to buy wine and some other cordials to her husband during his illness of which he died: That the napery consisted of about a dozen of servits, and two old table-cloths, and twenty-three shirts good and bad.* Depones, That some time after her husband's death, *she saw Robert Armour defender wearing some of the said Patrick Smith's body-clothes*: That there would be about a boll of meal, and meal-seeds to the value of ten pecks of meal, which was in her husband's house at his death, and was left there when she got her part of the furniture as above." And a little above letter K on same page, depones, "That the defunct had also at the time of his death, in and about his house, some planks and deals, and other timber; which he told her there would be as much as would serve him to work by himself for two years, if he had had a few more fir-deals."

James Murdoch weaver in Kilmarnock, p. 3. E, depones, "That some short time before Patrick Smith's death, he was about to buy a *press* from the deceased Patrick Smith, which the deponent got into his custody, the price thereof was to be about 30s. Sterling; but disagreeing about the price, it remained with the deponent till after Patrick Smith's death, when *the defender Robert Armour came and took it away* from the house of Laurence Pinkerton tanner in Kilmarnock, where the deponent had put it."

With

With this witness concurs the said Laurence Pinkerton, p. 3. at the foot, who depones, " That about the time of Patrick Smith's death, James Murdoch weaver, a former witness, set a *press* in- to the deponent's house, which he said he got from Patrick Smith; and told him the reason of his setting it there was, in order to prevent it being poided by his creditors: and about two or three weeks after Patrick Smith's death, *the defender Robert Armour came and took away said press.*"

And as to the defender's intromission with the defunct's charter-chest, Bailie David Brown merchant in Kilmarnock, depones, p. 3. G, " That in summer 1764 or 1765, after the deponent, and Robert Armour and Janet Smith defenders, being served with a summons before the sheriff of Ayr, at the instance of James Wilson pursuer, to exhibit and produce what writings they, or either of them, had, belonging to the deceased Patrick Smith; the defender Robert Armour applied to the deponent, who was then a present magistrate of Kilmarnock, to be present at the opening of a desk belonging to the defunct, in which his writings were supposed to be, *of which Robert Armour had the key.*" And p. 4. A, depones, " That after Patrick Smith's death, and some time before the above search, Robert Armour the defender showed to the deponent, an heritable bond granted by John Brown to Janet Brown and David Brown, with an infestment thereon, for 1000 merks Scots money of principal, over John Brown's houses in Strand of Kilmarnock; *but the deponent does not know, nor did Robert Armour acquaint him, how or when he came by said bond and infestment.*"

Such is the proof that your petitioner brought out against the defenders in this process; upon the import of which, when considered with a view to the principles of the law of Scotland applicable to the present case, mutual memorials were given in to the Lord Ordinary.

July 12. 1771. His Lordship was pleased, on the 12th of July 1771, to pronounce the following interlocutor. " The Lord Ordinary having considered the mutual memorials, testimonies of the witnesses, and former proceedings in this cause, finds the intromission with the defunct's body-clothes and chest proved, is too inconsiderable to subject the defender *passive* in payment of the defunct's debts: and as to the intermeddling with the defunct's writings, and the rents of his lands, that the same cannot subject the de-
fender

“ fender Robert Armour, who is proved to have intermeddled with
 “ these particulars, universally as *se gerentem pro herede*, in re-
 “ spect Armour is not heir by blood, and that his so intermeddling
 “ was in concert with the pursuer; and therefore assoilzies the de-
 “ fender from the penal passive titles insisted on by the pursuer,
 “ and finds he can only be subjected *in valorem* of his intromis-
 “ sions.”

Against this interlocutor your petitioner preferred a representa-
 tion; on considering which, with answers, his Lordship was pleas-
 ed, on the 3d of December 1771, to adhere to the same.

Dec. 3. 1771.

Your petitioner took the liberty to trouble the Lord Ordinary
 with one other representation. But his Lordship was pleased,
 on the 17th of December 1771, to pronounce the following in-
 terlocutor. “ The Lord Ordinary having considered this repre-
 “ sentation, adheres to the former interlocutor, and refuses the
 “ desire of this representation; superseding extract till the first fede-
 “ runt-day in January next.”

Dec. 17. 1771

Your petitioner would now humbly beg leave to submit his cause
 to the review of your Lordships: and he cannot help saying, that
 although, supposing the petitioner's interest only to be concerned,
 the consequences are, to be sure, not of such importance, as in
 many questions of which your Lordships have occasion to judge;
 yet this cause is truly important, and deserving of the most serious
 consideration on account of the point of law which it involves, and
 which your petitioner will be pardoned to say, is a point, that, in
 the present period of our law, requires all the support that courts
 and judges can give.

The defenders have been pleased to assume a kind of pleasantry,
 and to set forth, That your petitioner's chief motive for not acqui-
 escing in the Lord Ordinary's judgement, is a fondness to have the
 point of law tried, by way of amusement forsooth, and having the
 glory or merit of being chronicled in the decisions of this court.
 But whatever glory or merit the defenders may imagine there is in
 being so chronicled, your petitioner, an aged man, who has lived all
 his life in the country, and cannot so much as write his own name,
 feels no such ambition; and whatever anxiety he, as a good sub-
 ject, may have, that the law of his country should be maintained
 with inflexible strictness, he can assure your Lordships, that if he
 had not what appears to him to be a considerable sum at stake, and

B

did

did not think himself very improperly prevented from obtaining his just payment, he would not give the court so much trouble, or put himself to so much expence.

This is a process brought upon the *Passive Titles*; a principle of very ancient date in the law of Scotland, in so much that its origin cannot be traced, but is lost in distant obscurity. For although My Lord Stair, book 3. tit. 6. § 2. has fixed an æra to it, where he says, " This passive title, as *Spotiswood* observes, was but introduced by the Lords of Session, and was not before the institution of the College of Justice; the apparent heir being only liable for re-stitution of the single value formerly; as was found in the case of an heir's intromission with the heirship-moveables, Nov. 14. 1546, *Seatown La. Dirleton contra Dunbar*." Your petitioner will be pardoned for doubting his Lordship's authority in this particular: for he has in vain searched *Spotiswood* for it; and the accurate Mr *William Johnstone*, now *Pulteney*, in his notes upon the last edition of Lord Stair's Institutions, p. 505. observes, that the decision referred to in the passage just now quoted, " is not to be found." Indeed every thing concurs to induce a belief, that the principle of passive titles must have been known amongst us at a much earlier period than at the institution of the College of Justice. It is a principle, the reason and utility of which are coeval with fraud and dishonesty, which it is calculated to correct: and when we consider, that the proper method to avoid being subjected to it, is the ceremony of confirmation as executor, the administration and emoluments of which belonged to the churchmen, who of old had so great power and influence in Scotland, the internal evidence arising from the nature of the thing, is strengthened and illustrated by historical argument.

Stair, b. 3. tit.
6. § 3.

My Lord Stair, book 3. tit. 6. § 3. gives us, in a solid and conspicuous manner, the foundation and utility of subjecting *passive* an heir who has had irregular and improper interference with the predecessor's heritage. His words are,

" The reason of introducing this passive title; is in favour of creditors, that they be not unsatisfied, or shifted by the heirs of the defunct debtors; who, if they might continue possession of their predecessors means and estate, and be but countable, would rarely enter, and huddle up their intromission, and with time ascribe it to singular titles, abstracting their predecessors rights; and therefore

It is in the Pro. Sp. 10
P. 231. Aris. 10
H. 10. 10. 10.

“ therefore it was an expedient custom, that they should either
 “ enter legally, and for good and all, or that they should wholly
 “ abstain; especially seeing the law allows them a year to inquire
 “ into the condition of the defunct’s heritage, whether it will afford
 “ them loss or gain, during which time they may deliberate, and
 “ if they abstain, can be troubled by none. So that, though it may
 “ seem rigorous, *for a small intromission* to make the intromitter liable
 “ for all the defunct’s debts, how great soever; yet, it being so easy to
 “ abstain, and the hazard known, *the expediency and favour of the*
 “ *creditor prepondereth the wilful disadvantage of the debtor’s heir.*”

As our law is, in many respects, formed upon the noble example
 of the Roman jurisprudence, the passive title of behaviour as heir by
 the person next in succession to a defunct, is evidently borrowed
 from the *gestio pro herede*, so well known in the Civil law. But the
 law of Scotland hath a passive title peculiar to itself, viz. *Vitious In-*
tromission, upon which it is that the present action is principally
 founded. It is thus defined by Lord Stair, b. 3. tit. 9. § 1. *Stair, b. 3. tit.*
 “ Vitious intromission is only a passive title, making the intromit- *9. § 1.*
 “ ters liable to all the defunct’s debts *passive.*”

His Lordship, in the two following sections, explains and enfor- *Ibid.*
 ces the doctrine as follows. “ This is the largest passive title, ex-
 “ tending not only to those who have relation to the defunct, and
 “ have a title to be his heir or successor in moveables, but to any
 “ stranger intromitting without any interest; whereas *gestio pro*
 “ *herede*, and *successor titulo lucrativo post contractum debitum*, can be
 “ incident to none but apparent heirs, *qui precipiunt hereditatem*.
 “ But not only the children and nearest of kin intromitting are lia-
 “ ble *in solidum* for the defunct’s whole debts, but any other per-
 “ son having no legal interest of succession, which is peculiar to
 “ this, and no other nation, and not without ground.

“ The rise and reason of this passive title is, because moveables *Ibid.*
 “ are more easily abstracted from creditors of defuncts, than their
 “ lands, or profits thereof; which every one will not attain with-
 “ out a title, at least without being apparent heir therein. But
 “ if defuncts moveables might be meddled with without confir-
 “ mation, or making inventory upon oath, and no farther hazard
 “ than single restitution, there would never be a confirmation; but
 “ both creditors and orphans would be highly prejudged, by ab-
 “ tracting and concealing the moveables of defuncts. And to
 “ remedy

"remedy this, our law hath introduced this passive title, that, without confirmation, or other title, the meddler shall be liable *in solidum* to creditors."

Bankton, b. 3.
tit. 9. § 1.

To the same purpose Lord Bankton, b. 3. tit. 9. § 1. "Executors confirmed have the only active title with safety to administer and dispose of the effects of persons deceased; but if any wrongfully intermeddle therewith, he is liable, upon the passive title of vitious intromission, to make payment of the deceased's debts. This is justly introduced, to deter people from meddling with such moveables unwarrantably, which are easily embezzled. It is a singularity in our law, that vitious intromitters, or intermeddlers with moveables of a person deceased, are subjected universally to his debts." And, after mentioning *narrative*, "but the court of session are not at present so strict and rigorous as they were of old on this passive title," he adds, (as a respectful dissent from such deviations by the court), "*it is however a reasonable expedient as above*; and by the salvos after observed, the fatal effects of such intromission may be easily avoided."

Mackenzie,
b. 3. tit. 9. § 23.

That great ornament of the college of justice, Sir George Mackenzie, b. 3. tit. 9. § 23. lays down the law: "If any person intromit with the *defunct's moveables* without being confirmed, they are liable to the *defunct's whole debts*, whether they were related to him or not, *though their intromission was very small*: and this was introduced, to prevent the *fraudulent and clandestine abstracting* of the *defunct's moveables*, without inventory, in prejudice of creditors."

And the celebrated Craig, whose profound knowledge, and extensive and liberal views, have received the sanction of all the nations in Europe, delivers his opinion, *lib. 2. dig. 17. § 3.* in these words: "*Executor nomen juris est, intromissor nomen facti; hic in solidum pro debitis hereditatis tenetur, ille tantum pro viribus hereditatis; neque enim executoris officium cuiquam damnosum (ut postea dicemus) esse debet. At qui se alienis bonis immiscuit, cum culpa carere non potest, (nam in jure culpa est rei ad se non pertinenti se immiscere), cum convenitur a creditoribus, nunquam vires sue intromissionis exhaustas causabitur, neque pro rata tantum intromissionis convenietur jure nostro, sed in solidum tenetur. Itaque cautè providendum, cum quis se alienis rebus immiscere velit.*"

Craig, lib. 2.
dig. 17. § 3.

And

And § 16. *ibid.* after having mentioned that an executor, who Ibid § 16. has followed the regular forms of law, is not to be made accountable but *in valorem* of his intromissions, he says, " At longe aliud " in eo qui se immiscuit, volens et prudens, bonis alienis sine titulo, *cum culpa in jure sit, immiscere se rei ad se non pertinenti* ; is, " inquam, non pro viribus hæreditatis mobilium, sed in solidum " convenitur : imputare enim sibi debet, quod cum potuit abstinere, non tamen fecit ; cautè enim (nisi mandatum speciale habeat) ad administrationem rei alienæ debet quis accedere."

When your Lordships see the doctrine of passive titles established by such respectable authorities, you will not surely be less inclined to pay all due regard to it, than to any other principle of our law. It is a principle which, although it has received the sanction of positive statutes, and also of an act of sederunt of the court of session, by which its influence hath been enlarged and improved, is not primarily founded upon any statute, but has been established by the gradual operation of human prudence. Such principles are, in the petitioner's humble apprehension, much stronger than those which have a statute for their basis ; because statutes are sometimes made in a hurry, without a full and deliberate consideration of the different circumstances which may occur ; whereas a principle which has arisen and been established in the manner above mentioned, owes its very being to its having been found, by progressive and unerring experience, to be useful and salutary in all circumstances. Indeed unwritten or consuetudinary law has always been held to be of great authority ; for, as it is well expressed by the Roman lawyer, "*Immo magnæ auctoritatis hoc jus habetur, quod in tantum probatum est, ut non fuerit necesse scripto id comprehendere.*" l. 36. D. De legibus.

The principle on which the present action is founded, is besides peculiarly estimable, and to be attended to with more than ordinary care, because it is a principle proper to the law of Scotland, and nothing similar to it is to be found in that of England : for he who is called an *executor of his own wrong*, though subjected to some disadvantages, is not universally liable for debts. All such principles, as the law of deathbed, the law of passive titles, and others, which fall under the predicament just now mentioned, ought to be preserved with most faithful attention ; and judges, it is humbly thought, ought to be most cautious of infringing upon them, or even relaxing them in any degree, so as to endanger their continuance.

tinuance. At a time when the growing union with our great neighbouring nation has a tendency to make people attempt to refine away some of the most valuable laws of Scotland, which do not obtain on the south side of the Tweed, but which some of the greatest lawyers in that country have wished to obtain; at a time when it has become fashionable to quote the law of England in our judicial proceedings, and to endeavour to model the judgements of this court upon it; your Lordships will surely be of opinion, that it behoves our judges to watch with a jealous eye, and unremitting vigilance, against encroachments which may be fatal to the law of Scotland, and not allow it to be weakened by decisions, which, under the specious denomination of liberal and equitable, are really and truly elusory.

An able antiquarian, whose curious researches have been partly employed in the history of the court in which he sits, informs us, in the notes on his *Catalogue of the Lords of Session*, that at a certain period, "under the pretext of judging *according to equity and good conscience*, there was an intention of abrogating the law of Scotland, and introducing that of England in its place." But your Lordships predecessors, as faithful guardians of the law of their country, adhered to it with becoming firmness; and we may please ourselves with the thought, that it has not "withered in the hands" of this court; but is transmitted down unhurt to the age in which we live. Nor can it be doubted, but that your Lordships will be equally careful of the law, the important trust of administering which is conferred upon you, and will not allow breaches to be made upon it from arguments of abstract philosophical rectitude, or motives of particular lenity. Such incroachments are carefully to be repelled; otherwise it is to be feared that they may in time be fatal to the laws, which ought to be supported with a pre-eminent regard.

The best writers upon general principles of law have agreed, that although penal laws must be construed strictly, yet such laws, when they are corrective of frauds, are to be liberally and beneficially expounded. In your petitioner's humble apprehension, both kinds of interpretation must be favourable to the plea which he maintains. If the law of vitious intromission is to be strictly interpreted, the defenders must be found liable; for that law, as your Lordships have just now read it in the words of our law-books, is explicit and determined, and admits of no exception. It is simply

simply this, That whoever shall without a legal warrant intermeddle with the effects of a deceased person, shall be liable for all his debts. If again this law is to be liberally and beneficially expounded, the defenders must also be found liable: for consideration must be had for whose benefit the law was introduced; and your Lordships know it was for the benefit of creditors; for as Lord Stair observes, book 3. tit. 7. § 1. "There is no nation hath been Stair, b. 3. tit. 7. § 1.
 " more favourable to creditors, or more studious of their satisfaction-
 " tions, than this." As then this law was introduced for the benefit of creditors, the liberal and beneficial interpretation of it certainly is to render it as great a security to creditors as possible, and not to allow those who offend against it to escape, by alledging, that the degree in which they have offended does not amount to what ought to be held as sufficient to infer the penal consequences.

The texts which have been quoted to your Lordships from the writers upon the law of Scotland, make no mention of a greater or lesser degree of vitious intromission, but are conceived in the most general terms: and in corroboration of the generality and extensive nature of the principle, your petitioner does also appeal to an act of parliament passed since the Revolution, intituled, *Act anent Vitious Intromitters*; which, as it is, like our other Scottish statutes, short and concise, shall here be fully engrossed. "Our Sovereign Lord considering, that many times the nearest of kin and others doth *intromit with the moveables of persons deceased* without confirmation, and embezzles the said moveables in defraud of lawful creditors, and when they come to be pursued at the instance of any of the creditors for being liable to the defunct's debts as vitious intromitters, they ordinarily defend themselves with this pretence, That there is an executor-creditor confirmed before the intenting of the action, whereas a third party confirming executor-creditor in a particular subject ought not to free the intromitter from the *passive title* of vitious intromission when the intromitter has no right from the executor-creditor; therefore, for obviating such frauds in time coming, his Majesty, with advice and consent of the estates of parliament, statutes, ordains, and declares, That the nearest of kin, and others *intromitters with the moveables of any defunct*, who are not executors confirmed to them, nor have right from the executor-creditor before his intromission; are, and shall be liable as vitious intromitters, notwithstanding that there is a third party confirmed executor in a particular

" ticular debt or subject." 1 parl. Will. chap. 20. Your Lordships will be pleased to observe, that when the law of vitious intromission was taken under the serious deliberation of the legislature, after it had long obtained and been well tried in Scotland, the wisdom of parliament thought proper to provide against a *pretence* fallen upon by vitious intromitters, to defend themselves against the *passive title*; but, although there was then a very good opportunity for it had such a measure been reasonable, introduced no limitation, but by the tenor of expression from first to last of the act, plainly pointed out its being held as the known and established law of the country, that *unwarranted intromitters with the moveables of a defunct*, without distinction as to the degree of their intromissions, *should be liable as vitious intromitters*.

It often happens, that in a particular instance, the application of a law founded upon a principle of general utility, will bear very hard upon an individual: but there is no help for this. General principles, when good, must be strictly maintained. When the poor thief complained, that it was very hard he should be hanged for stealing a single sheep; " You are to be hanged, (said the judge), " not for stealing this sheep, but that sheep may not be stolen." In like manner the passive title inferred from vitious intromission, which is to be considered as a penal sanction to preserve the effects of a defunct debtor from being embezzled by those who have access to his house and repositories, must not be relaxed; otherwise intromitters would flatter themselves, that they might go so artfully to work, as to have a chance, that only intromissions of small value would be detected, and so they would escape. When your Lordships consider in how many instances creditors are defrauded by vitious intromissions which never come to light, you surely will not be disposed to lessen that awe which every one ought to have of the danger that there may be in putting forth an illegal hand. *Noli me tangere* is the motto which the effects of every defunct ought to present to the minds of those around him, who are not sure of the state of his affairs, and who have honest intentions. Nor ought it, with great submission, to avail such, that they have only taken, or been discovered to have taken, things of small value; for, to repeat the expressive words of Lord Stair, " the expediency and favour of the creditor preponderateth the wilful disadvantage of the debtor's heir."

If we mount up to the source of all law and justice, from
whence

whence indeed the greatest writers on law begin their inquiries, we there find, that a penal sanction must take effect, although the transgression be not in a very flagrant and extensive degree: for, with the most profound awe and reverence be it spoken, how small appears to us the intromission which our first parents had with the forbidden fruit, which yet was attended with such heavy consequences;

“ Brought death into the world, and all our woe.”

But the law was fully made known; and if they did not abstain, they were guilty of wilful transgression, and therefore were only subjected to *wilful disadvantage*, that admirable expression of Lord Stair upon the doctrine pleaded in this cause; and which it is believed none of our divines have excelled when writing upon the doctrine on which it is their province to treat.

Your Lordships are intreated to consider, that when a law is once made and promulgated, every infringement of it must be sustained as sufficient to infer the penalty; otherwise the application of it must become altogether *arbitrary*; a consequence which every man who thinks justly, must consider as worse than a total want of all law. Your petitioner would beg leave to quote a passage from the speech of a Great Man on the reversal of *Wilkes's* outlawry. “ As to the consequences of establishing this outlawry, as they may affect the defendant as an individual, whatever they may be, the defendant has brought them upon himself. *They are inevitable consequences of law arising from his own act.* If the penalty to which he is thereby subjected is more than a punishment adequate to the crime he has committed, he should not have brought himself into this unfortunate predicament, by flying from the justice of his country. He thought proper to do so, and he must taste the fruits of his own conduct, however bitter and unpalatable they may be: and although we may be heartily sorry for any person who has brought himself into this situation, it is not in our power, *GOD forbid it should ever be in our power*, to deliver him from it: *we cannot prevent the judgement of the law.*” Your petitioner quotes this passage, not as a piece of *English law*; but as a noble illustration of what he humbly means to express, and which comes with a better grace from a person of high dignity and distinguished eloquence.

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And

And in truth, your petitioner, with the greatest submission, cannot see how or in what manner a law can be useful, if it is administered with innumerable arbitrary exceptions: for there being no certain line or boundary fixed, the lieges must be in absolute uncertainty how to conduct themselves; and the decrees of judges must be various, and seemingly contradictory. Were vitious intromission ascertained by the law according to a certain mode and degree, as we have L. 100 Scots ascertained as a sum that can be probable by witnesses, year and day as the term of endurance of a marriage, which shall be sufficient to give a man the legal rights of a husband, forty years as the long prescription, and other such regulations well known to your Lordships, then there might be room for arithmetical argument, and judges might listen to a defender endeavouring to shew that his intromission did not come up to the legal standard. But, with great deference, the law of vitious intromission does not stand so. It is one of those laws, of which many occur in human society, where a *general principle only* obtains; one of those laws to which the maxims of *Majus et minus non variant speciem*, and *Iustitia non consistit in quantitate*, do most properly apply. A centinel who quits his post, is by the military law punished with death; and it will be in vain for him to plead, that he was guilty of a very small deviation from his duty. General expediency requires, that not a jot of a salutary law should be infringed with impunity.

Manifold parallels might be adduced to illustrate this; but the considerations evidently arising from the point in question are, with submission, exceedingly striking in two views, both respecting the encouragement of vitious intromitters, and the discouragement of those who are to bring them to justice. If those who are guilty of vitious intromission, see that your Lordships allow a certain degree of it, when brought to light, to pass free of the penal consequences, their fraudulent and rapacious inclinations will incite them to intromit still a little farther, and a little farther, in the hopes that they may be still a little more indulged than those who have gone before them; and when creditors who have suffered by vitious intromission, and upon the faith of the law of their country, as expressly laid down by the best writers upon it, have been at the trouble and expence of bringing a process, leading a proof, and detecting, as much as circumstances will admit, such unlawful intermeddling, and after all obtain no redress, because they have not detected

tested what may be thought *sufficiently considerable*, the uncertainty and risk will be considered as so great, that very few will wish to engage in such a process.

Having said so much in general, your petitioner shall now humbly proceed to analyse more particularly the interlocutor of the Lord Ordinary submitted to review.

And *first*, his Lordship finds, " That the intermeddling with the defunct's writings, and the rents of his lands, cannot subject the defender Robert Armour (who is proved to have intermeddled with these particulars) universally as *se gerentem pro herede*, in respect Armour is not heir by blood, and that his so intermeddling was in concert with the pursuer." Your petitioner has already mentioned, that he was led in to concur with the defender in certain measures; therefore, to be sure, he must candidly acknowledge, that he has lost the benefit which he otherwise would have had from a proof of a great many of the intromissions had by the defender; but your Lordships will be pleased to observe, that there is one material particular proved against the defender, viz. his possessing himself of the key of the defunct's charter-chest, which was by no means in concert with your petitioner.

This circumstance being proved, your petitioner does humbly maintain, that he is intitled to presume every thing against the defender; and in such cases as this, where undue and fraudulent concealment is subsumed, presumptive evidence ought to have full weight. Here then your Lordships see the defender with the key of the defunct's charter-chest in his pocket; the repositories are not sealed up at the proper time; no one is then called to be present at the opening of them; nor is any thing done to make creditors secure that every thing should remain in the same situation as when their debtor died. The defender indeed, when called upon to exhibit certain writings before the sheriff of Ayr, makes a farce of having a magistrate present at the opening of the defunct's desk, and in that view takes with him his friend Bailie David Brown; but so thin a pretext will not cover the real matter of fact, which was neither more nor less, than his having all along the key of, and consequently free egress and regress to the defunct's repositories.

In these circumstances, your petitioner must hold him as unwarrantably and illegally intromitting with the defunct's writings, and it is impossible to say what he may have taken out, having his
hands

hands among them at so early a period, and as from his conduct and behaviour in other respects there is no reason to believe that he would be very delicate in his proceedings. Certain it is, as your Lordships have seen from the proof, that about this period he appeared with a bond in his hand, which was believed to be lying in the defunct's repositories, with a discharge and renunciation of it, and in virtue of which very bond, he, in his wife's right, now claims a preference to your petitioner's debt secured upon Patrick Smith's subjects. So that your petitioner is here, properly speaking, *certans de damno vitando*.

It is, with submission, not easy to resist drawing a very unfavourable conclusion here. The temptation to a vitious intromission to destroy the discharge and renunciation, was very strong: and as an evidence that such a discharge and renunciation did exist, and that Patrick Smith's subjects were therefore clear of incumbrances, the writer of Smith's bond to your petitioner, who was Smith's doer at the time, and consequently well acquainted with his affairs, gave his own bill to your petitioner for Smith's debt, which bill lay in your petitioner's hands for several years. Add to this, that the defender Robert Armour's wife made up no titles to the bond on which she now claims, till after her husband had access to Smith's papers after his death.

The question then, upon this branch of the interlocutor, must be, Whether this intromission with the writings by Robert Armour, though not himself heir by blood, will not subject Janet Smith, the daughter of the defunct, and him for his interest?

In a case reported by Lord Fountainhall, December 17. 1703, *Home of Linthill contra Phillis Dickson*, this point, of an heirs being subjected on the passive titles on account of her husband's intromissions, appears to have been very deliberately considered by the court. It was there most convincingly pleaded, That "if an heirs can evade the passive title, because she does not intromit herself, and her husband sicklike evade it, because he is not the person that can succeed or behave; by this circular juggling, heirs may *impune* possess their predecessors estate, and the security of creditors be wholly overturned." And the learned collector thus gives us the result: "Some of the Lords were clear to find it an universal passive title, to make them simply liable: but it being craved no higher but *in valorem*, the Lords found the husband liable, in so far as his intromission should be proven against him, seeing they are *una persona in jure*, and his intromission in her
"right,

Fountainhall,
Dec. 17. 1703,
Home contra
Phillis Dick-
son.

“ right, must be reputed to be her own intromission, which if it were,
 “ she behoved to answer her predecessor’s creditors *in solidum*; and
 “ here it was no farther extended than to his actual intromission,
 “ and not to make them simply liable.”

Here your Lordships see the sense of the court on this subject; and that if it had not been *ultra petita* of the pursuer, the Lords would have found an universal passive title incurred: and this the petitioner does, with all deference, maintain to be the just and rational construction of law; for it is an established maxim, That a husband and wife are *eadem persona*, and therefore the acts and deeds of the one ought to be imputed to the other. This will *a fortiori* apply to the acts and deeds of a husband; because during the subsistence of marriage, a wife has really and truly no power independent of her husband; all administration is vested in him, and it is only by him that the wife can act, except in domestic affairs; and even with respect to these, she is constantly under the controul of her husband, as he can at any time, by his mere will and pleasure, without so much as assigning any reason, deprive her of her *prepositura*. And, with submission, it would be exceedingly dangerous, should it be generally understood, that the intromissions of the husband of an heiress are not to be held as equivalent to her own intromissions: for in every case, where an heiress is clothed with a husband, the device which it would seem was practised in this case, would be fallen upon to elude the law; the husband, who ordinarily acts in all such affairs, would, in place of his wife, rummage the defunct’s repositories, and seize upon his papers at pleasure.

So that your petitioner flatters himself, that when your Lordships have had an opportunity of maturely reviewing this point, and considering the bad consequences that would infallibly ensue, should the doctrine which the defender pleads be held as law, your Lordships will be inclined to pronounce a different judgement from that of the Lord Ordinary.

The other point in the Lord Ordinary’s interlocutor, viz. “ That the intromission with the defunct’s body-clothes and chest proved, is too inconsiderable to subject the defender *passive* in payment of the defunct’s debts,” is still of more consequence, because it is of still more general concern. Every defunct has not writings in his possession; but every defunct has goods or effects of some kind or other, which greedy people who hover like harpies

E

around

around the dying, may abstract or embezzle. In this case, the Lord Ordinary's interlocutor mentions only a chest and body-clothes : but your Lordships have seen, that the defender's intromissions are even proved to have extended to various other articles, such as sheets, blankets, and napery.

And after having stated the law of vitious intromission so fully to your Lordships, the petitioner humbly contends, that the application of that law to the case in hand, is what your Lordships cannot get over. It is *triti juris*, that a pursuer, in libelling upon vitious intromission, is not bound to condescend on particulars. Provided vitious intromission only be libelled, there is held to be a sufficient relevancy. This, in your petitioner's humble apprehension, imports, that vitious intromission in any degree will subject to the penal consequences ; and so far the forms and practice of the court in processes of this nature, exactly correspond with the principles which have been quoted to your Lordships from our law-books.

But as the defenders have taken upon them, without pointing out a single decision, to maintain very roundly, that the interpretation given by your Lordships to the law of vitious intromission has been favourable to people under their predicament, your petitioner, who could not allow himself to think it possible that the law could be wounded in the house of its guardians, has made a thorough search into your Lordships decisions, and he has had the satisfaction to find, that the defenders were speaking without book, when they were pleased to plume themselves upon having the decisions on their side. These are not merely *verba jactantia* ; for the petitioner shall now lay before your Lordships such a *series rerum judicatarum*, as he beleives the defenders will make but a sorry figure in attempting to counterbalance.

Darrie, March
20. 1624,
Cochran con-
tra Sturgeon.

" In the action pursued by James Cochran burges of Edinburgh
" against Helen Sturgeon, as intromissatrix with the goods of her
" umquhile husband, for payment of a debt owing by her husband
" to the pursuer ; her intromission being condescended to be of wares
" in her husband's merchand-buith, in the town of Dunse, where
" he dwelt, such as pepper, and spices, and such like other wares,
" which she alledged was sold by her, for the supply and necessary
" entertainment of herself and her bairns, in meat and drink, having
" no other means wherewith to entertain them ; the Lords found,
" That she was answerable, as intromissatrix, to the pursuer, for his
" debt owing by her husband."

" Gilbert

" *Gilbert Johnston*, and *Mason* his spouse, convened *Mason*, as being-^{Durie, July 14. 1626, Johnston contra Mason.}
 " having himself as heir to his umquhile father, by intromission
 " with his heirship goods, to make payment of a sum of money
 " promised to them by his father in tocher: in the which cause,
 " the defender alleged, That he could not be convened *hoc nomine*,
 " as intromitter with the said heirship goods, to make him heir;
 " because he being infest by his umquhile-father in a tenement of
 " land before the contract of marriage libelled, after the decease
 " of his father, he removed the relict, and entered to the possession
 " of that tenement, within the which the said heirship goods was
 " then standing for the time, and which he could not cast out, but
 " suffered the same to remain in the house, where they are yet ex-
 " tant to be forthcoming to the pursuer, or any other having in-
 " terest in the same; and except he had sold and disposed thereup-
 " on, or had made some other use of them, than by retaining of
 " the same in the house, he cannot be therefore convened, as there-
 " by behaving himself to be heir: this alledgeance was repelled,
 " and the retaining of the possession of the said goods, and using
 " of the same, by *eating on the boards, and lying on the beds*, was
 " found sufficient."

" In an action at the instance of one *Frazer contra* the Laird ^{Durie, Jan. 17. 1627, Frazer contra L. Monimusk.}
 " *Monimusk*, for the payment of 500 merks contained in his um-
 " quhile father's bond, for the which the defender was convened,
 " as behaving himself as heir to his umquhile brother; which bro-
 " ther was served heir to their father, who was debtor by intro-
 " mission with his brother's heirship goods: the Lords found
 " the using of the following particulars at table, viz. *the best bason*
 " *and silver spoons, washing therein, and supping and eating with the*
 " *spoons, and eating upon the best board, and lying in the best bed*, to be
 " a sufficient qualification, being proven, to make the defender
 " heir, notwithstanding of the offer to make the same forthcoming
 " as good as they were, and that albeit the first time of his intro-
 " mission was as tutor."

In a case, *L. Moristoun contra L. Fren draught*, July 12. 1628, ^{Durie, July 12. 1628, L. Moristoun contra L. Fren draught.}
 Lord Durie observes, " In this process, as in all the like cases
 " pursued against parties as *universal intromitters*, the Lords are ay
 " in use to find, That one convened as universal-intromitter, if he
 " be proven to have any intromission with the defunct's goods, al-
 " beit he be not proven to have intromitted with all, is liable to pay
 " the

“ *the debt for which he is convened, if he cannot purge his intromission before there be an executor confirmed to the defunct, who may have *beneficium inventarii*; for his vitious intromission produces that effect.*”

Durie, Feb. 14.
1629, Steven
contra Pater-
son.

“ One *Paterfon* being convened as heir to his father John Paterfon, by intromission with his heirship goods, for payment of a debt of 1000 merks, owing by his father; and the defender purging his intromission by warrant of the *Lords*, granted to the defender, and direct to the bailies of *Edinburgh*, to make inventar of the goods being in his father's house; according whereunto inventar was made, the goods contained in the which inventar are extant to be made forthcoming; wherefore he alledged, that he could not be thereby convened as heir: and the pursuer replying, That by and attour the goods contained in the inventar, the defender had intromitted with *his father's Bible, a sword, a stand of curtains, and two pillows*, which were the best his father had; and which was heirship, which the defender had used, and were not contained in the inventar: these particulars, and this manner of intromission, *albeit both the particulars were few, and little worth*, and also that the defender's intromission was only qualified in using of them, and not in disposing of them, or making any advantageous use or benefit thereof, was *sustained to make him heir, and subject to pay the debt of 1000 merks.*”

Durie, Jan. 15.
1630, Cleg-
horn contra
Fairlie.

“ *Clegborn*, as assignee to a bond of 100 pounds, made to *Katharine Scowler* by umquhile *James Fairlie*, pursues the daughter of the elder brother of the said umquhile *James Fairlie*, as heir of conquest, and *Maxwell*, her spouse, for his interest, and *William Fairlie*, younger brother to the said umquhile *James*, as heir of line, for registration of the said bond; and the younger brother heir of line, offering to renounce, the heir of conquest alledging, that he could not be heard to renounce, because he had intromitted with the heirship goods of the defunct, standing in the house where he died, and remained still in possession of the house, and had *lyen in his bed and bed-clothes* which were standing in the said house; likeas he meddled with a *maser* which was in the defunct's possession, and drank therein, and used it at his pleasure, and did *wear his green silk shanks*: this allegiance was *sustained to make him heir, and that he could not renounce.*”

Durie, Jan. 25.
1632, Scarlet
contra Pater-
son.

“ *Scarlet* pursuing *Paterfon* as heir to his father, by intromission with his father's heirship goods, and so thereby behaving him-
“ self

" self as heir, to pay his father's debts; he compearing, and pro-
 " posing an exception, That his intromission was only by virtue
 " of a warrand of the *Lords*, directed at his instance, craving inven-
 " tar to be made, that the goods might be made forthcoming
 " to all parties having interest, (and that his meddling with the
 " same upon inventar, as use is, should not make him heir), accord-
 " ing whereunto inventar was made by the judge and clerk to
 " whom the *Lords* committed the same, and which goods were yet
 " extant in that same estate: and the pursuer replying, That the
 " defender had intromitted with a *Bible, and an hagbut and sword,*
 " *and a cod, and board-cloth, and curtains of a bed,* and had used them
 " on this manner, viz. *by reading on the Bible,* and retention in his
 " house of the hagbut and sword, and by lying on the cod, and
 " hanging the curtains about the bed, and by spreading of the
 " cloth upon the board; which particulars were not given up by
 " the defender at the making of the inventory, but were fraudu-
 " lently left out thereof; at least must have been presumed to have
 " been done fraudulently, seeing they are not in the inventar,
 " and the defender having used them as said is, (whereby he can-
 " not pretend ignorance), he must thereby be liable as heir: the
 " *Lords* found this reply relevant, albeit it was not alledged that
 " the defender had disposed or sold any of the foresaid particulars;
 " and albeit the party alledged, that the retaining of the same, and
 " using of the same, as was qualified, could not thereby infer him
 " to be liable to all his father's creditors, seeing the omission to put
 " them up in the inventar, might have proceeded from either his
 " ignorance, or that the same were not then in his sight, or that the
 " clerk might possibly have forgotten to write them up, and *they were*
 " *of so little avail and of so small importance,* that thereby he cannot be
 " made heir; specially seeing he offered to make them all forthco-
 " ming, and that they were extant in as good estate as they were the
 " time of the inventory: *which duply was not sustained,* but they
 " found, that they would *advert diligently* to the probation anent
 " the deeds of the defender's intromission, and to *the very particulars*
 " which should be proven to have been intromitted with by him,
 " and the manner thereof, and would thereafter consider at the ad-
 " vising of the process, if thereby the defender should be found in
 " reason, liable as heir, or not; to which time the *Lords* supereded
 " to declare, if he shall be thereby heir or not, and what it shall
 " import."

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Although

Although in the case just now mentioned, the learned collector has not given us the final judgement of the court, yet the preliminary debate and interlocutor thereupon, strongly evince the ideas entertained upon the point at issue. Your Lordships will not fail to remark in it this singularly curious circumstance, That *reading upon the predecessor's Bible* was considered as *vitious intromission*; which shews with what a scrupulous strictness this valuable law was treated by your Lordships predecessors, who would not allow the passive title of vitious intromission to be forgotten or palliated, although it was qualified by a circumstance so natural and proper for one who had lost a near relation, as searching the scriptures for the consolations of religion. We must not do evil that good may come of it; nor ought it to excuse an improper intermeddler, that the thing intermeddled with may serve the most excellent purpose. A young man was sentenced for banishment as a thief, a few years ago, at the circuit-court at *Ayr*, though one of the capital articles which he had purloined was a copy of *The confession of Faith*.

Durie, Jan. 12.
1633,
contra Bruce.

" In a pursuit of registration of a bond of 500 merks against *Bruce of Stanfill* in Orkney, as universal intromitter with the defunct's goods, who was granter of the bond, the defender was found universal intromitter, and decret given *eo nomine* against him, *albeit it was proven only, that he intromitted with an hat of the defunct's, an iron saw, and a chest, and a brazen pistolet pertaining to him, whereof no price was proven, and with an horse, which was sold for eighty pounds*, there being nothing further of any more intromission proven to be had by the defender; neither ever was it proven, what other goods the debtor had, or who had intromitted therewith, nor that ever being inquired at the witnesses, albeit the debtor was a gentleman who had heritage; and as it was not found enough, (as some of the *Lords* thought expedient), that the defender should be decerned to make the particulars, and prices thereof, whatever the same might be proven to be worth, forthcoming to the pursuer, and not thereby to make him liable to the whole creditors as universal intromitter: for the *Lords* thought, that he being vitious intromitter, and without a title, or probability of a title, *albeit he had intromitted with any goods of the smallest moment and quantity that might be, and the debt never so great, yet by that intromission, which could not be warranted in law, he was subject to pay the whole debt.*"

Durie, Feb. 5.
1636, Mowat
& Dagers contra
Pennie.

" Umquhile Dagers having pursued *Christian Pennie* before the
" commissars

“ commissars of *Edinburgh*, as executrix to *Dagers* his debtor, for
 “ payment of the debt ; and after *litiscontestation* the said *Christian*
 “ *Pennie* dying, this act and process is desired to be transferred in
 “ *Bessie Pennie*, sister to the defender, as *universal intromissatrix*
 “ with her goods and gear ; which summons being admitted to
 “ probation against her, (she not compearing), the *Lords* found
 “ the summons proven against her, and decerned against her *hoc*
 “ *nomine*, as universal intromissatrix, albeit *the probation bore this*
 “ *only, and no more, viz. That the two sisters dwelt together in a*
 “ *little house*, where the said sister died ; after whose decease the o-
 “ ther sister, the defender, intromitted with *a little timber bed* and
 “ *a pint-stoup* which pertained to the defunct, and which the de-
 “ fender sold ; and all wherewith she intromitted were not worth
 “ so much money as would pay a term’s mail of the house where-
 “ in they dwelt, and *would not extend to six or seven pounds, or*
 “ *thereby ; which the Lords found sufficient to make her liable as uni-*
 “ *versal intromissatrix*, seeing no party compeared to propone any
 “ defence of hypothecation of the said goods to the said heritor
 “ for the house-mail, *albeit the debt for which the defender was pur-*
 “ *sued exceeded* *hundreth pounds.*”

It is true, that these two last decisions were in absence ; but as the court fully expressed their *rationes decidendi* in their interlocutors, they must be held equally strong with any other decisions upon record.

“ In A CONCLUDED CAUSE, at the instance of the Laird of *A-Stair*, June. 15.
 “ *bercairnie* against *Nicol*, as behaving as *heir* or *vitious intromitter* 1675, L. A-
 “ with his father’s goods, for payment of one year’s rent due by *bercairnie*
 “ his father, contra *Nicol*.

“ The Lords found *vitious intromission* proven, by the defender’s
 “ *making use of his father’s tools and instruments*, who was a wright,
 “ and the son’s being also a wright, and continuing to work with
 “ the same, *albeit there was only one witness* that proved that he
 “ disposed or sold any part of the work-looms.”

“ The Marquis of Tweeddale pursues *Helen Henderson*, relict Fountainhall,
 “ of *Dempster* his chamberlain, for payment of the balance of his Dec. 17. 1698,
 “ accounts, upon the passive titles, as representing her husband ; Marquis of
 “ and probation being led, it was proven, *by single witnesses*, that she Tweeddale
 “ had intromitted with *L. 15 Scots, and other small sums*, not given contra *Hen-*
 “ up by her in the inventar of the confirmed testament, as execu-
 “ trix-creditrix on her contract of marriage, and so presumed to be
 “ fraudulently

" fraudulently omitted ; and there was the concurring testimony of
 " two witnesses, proving, she had disposed of *some plough-graith and*
 " *cart-wheels.* Answered, That *testes singulares nihil probant* ; and
 " where there was a conjunction of two witnesses, it was *de re mi-*
 " *nima* ; and the plough and cart graith was confirmed, in so far
 " as the utensils and domiciles of the house being given up, they
 " behoved to be included in that article, at least it was a probable
 " ground for her to think so ; and *passive titles being odious*, are not
 " to be extended where *the intromission is small and inconsiderable.* The
 " Lords considered, that wives had great opportunities of con-
 " cealing and embezzling money, and other moveables, and she
 " had an universal intromission, and it appeared there was 1600
 " merks lying beside him a little before his death, and which now
 " they would give no account of, therefore the Lords found her
 " liable. And *our predecessors have not so much regarded the small-*
 " *ness of the intromission, as the animus fraudandi.*"

Forbes, June
 29. 1705,
 Archibald
 contra Law-
 son.

" In the action, at the instance of *Patrick Archibald* against
 " *George Lawson*, the Lords found the *transporting of a person's*
 " *chests or trunks* after his death, from the place where he died, to
 " the defender's house, relevant to infer vitious intromission against
 " him."

Your petitioner has thought it best to lay these decisions so fully before your Lordships, marshalling them in the order of time in which they were pronounced. From a complex view of them, it appears, that your Lordships have been exceedingly careful to maintain the salutary law of vitious intromission, in so much as, in some cases, to sustain evidence of it by single witnesses. Your Lordships have not easily listened to plausible defences to excuse from it, although, *Quivis titulus etiam coloratus excusat*, a maxim invented by the ingenuity of offenders, has been regularly repeated with the same effrontery in every process of this kind, while care has also been taken to throw in the doleful epithet of *this odious passive title.* Your Lordships have found very small matters sufficient to infer vitious intromission ; and the only time that the point has been solemnly judged upon a hearing in presence, the things intromitted with were of very small value indeed. No arguments of compassion have been listened to, on account of the low circumstances of the defenders, even when contrasted with the superior rank of pursuers. The Marquis of Tweeddale obtains judgement against the poor relict of

of his own chamberlain; the Laird of Abercairnne against a poor wright, his own tenant's son. Nor did the court dispense with this important principle of law, either when temporal or spiritual necessities seemed to require it; when an unhappy widow intromitted only so far as to provide meat and drink for her children, having no other means wherewith to entertain them; or when a son, afflicted with the death of his father, intromitted with a Bible, in order to employ himself in reading the word of God. The principle which runs through all these decisions, is this strong consideration, That the law, from a just jealousy of human nature, as *cereus in VITIUM flecti*, having secured the effects of deceased debtors by a penal sanction in favour of creditors, that sanction, so generally useful, must be *constans et perpetua*, so as to have the full effect intended by the law.

The defenders will probably endeavour to avail themselves of the following decision to be found in the Dictionary, *voce Vitious intromission*, and which is the latest decision connected with the point at issue yet published. " Mary Wallace being due the sum of 1000
 " merks by bond, a process for payment was brought after her de-
 " cease against Elisabeth Wallace her sister, and John and Mary Kings
 " her children, concluding upon the passive title *vitious intromis-*
 " sion. The Lords found it only proved against Elisabeth Wallace,
 " That she had some small moveables in her custody for the be-
 " hoof of John and Mary Kings, which had been in the possession
 " of Mary Wallace preceding her decease; and that she delivered
 " these moveables to John and Mary Kings upon their receipt; and
 " found such custody and delivery not relevant to infer the passive
 " title of vitious intromission against the said Elisabeth Wallace;
 " and found it proved, That the defenders John and Mary Kings
 " did receive from the said Elisabeth Wallace some of their bro-
 " ther's body-clothes, a five-guinea piece of gold, and four small
 " pieces, in value twenty-three shillings, and some household-fur-
 " niture which had been in the possession of their mother before
 " her decease, for which they granted receipts, in process, to the
 " said Elisabeth Wallace. But in respect of the small value of these
 " particulars, and that special receipts were granted for them, and of
 " the uncertainty whether the articles of household-plenishing did tru-
 " ly belong to Mary Wallace the mother, or to Mr John King her hus-
 " band, and had only remained in her custody after the husband's
 " death without title; and that by the proof it appeared, that the

Dictionary,
 Jan. 26. 1739.
 Black contra
 Wallace and
 Kings.

" bulk of the effects of Mary Wallace had been roused by John
 " Wallace her brother ; found, That John and Mary Kings *their*
 " *intromission* with the small particulars contained in the receipts,
 " could not, in law, be construed an intromission *per universitatem*,
 " and therefore not relevant to infer the penal passive title of vi-
 " cious intromission against them ; 26th January 1739, Black
 " *contra* Wallace and Kings."

But, with submission, the circumstances of this decision are such, that it cannot in any sound construction be held as a decision upon the point of law with regard to vicious intromission. There was the greatest uncertainty, whether or not the articles of household-plenishing intromitted with, did really and truly belong to the defunct debtor ; and *in dubiis*, especially where there is a doubt as to the *corpus delicti*, it cannot be disputed that judgement should pass for the defender. Besides, it was perfectly clear, that in this case there was no *vitiosity*, properly so called, no intention to secrete and embezzle, as the defenders had granted special receipts for the particulars : and on looking into the printed papers in that cause, it appears, that the principle of vicious intromission, as maintained by your petitioner, was not disputed by the defenders ; for in their answers to a reclaiming petition for *Black*, the doctrine of vicious intromission is acknowledged to be " a valuable part of our law ;" and the following passage is to be found in that paper. " The pe-
 " tioners seem to be in greater anxiety and concern for the passive
 " title of vicious intromission, than for the gaining of their cause.
 " But when the fact is duly attended to, it is humbly hoped it will
 " appear, that *the passive title of vicious intromission cannot be applied*
 " *to the case in question.*" And therefore your petitioner flatters him-
 self, that your Lordships will be of opinion, that this decision does in no degree express the sense of the court upon the important point of law, which is now humbly submitted to your Lordships review, unembarrassed with any discriminating circumstances in point of fact, to take it out of the general purview.

Your petitioner has reserved one or two select decisions, to which he would now humbly beg leave to call the attention of the court.

Fountainhall,
 June 24 1697,
 Duff contra
 Earl of Sea-
 forth.

" William Duff in Inverness, pursuing the Earl of Seaforth on
 " the passive titles, for payment of a debt due to him by his father,
 " and referring the same to his oath, one of the articles whereon he
 " was craved to be interrogate was, Whether he had not intromit-
 " ted with and used his father's parliament-robcs ? This the Earl
 " reclaimed

"reclaimed against, as neither pertinent, nor relevant to infer vitious intromission, seeing that was only in consequence of his assuming the title and dignity of Earl, which was never found to infer a passive title."

Here was a question of very nice and delicate discussion, having something in it connected with the high privileges of a Lord of parliament; and therefore there was a fair trial of the ideas of law with regard to vitious intromission, as the parliamentary robes were not of great value when an Earl's inheritance was in question. Had it been understood, that intromitting with subjects not of great value would not infer a passive title, the court would not have allowed a proof of such an article, especially when it was of so peculiar a nature. But your Lordships will be pleased to attend to the decision in the words of the learned Collector. "The Lords ordained the Earl to depone anent the interrogatory, and reserved the consideration what it should import, till the advising of his oath: for it was urged, such robes may be pointed as well as any other moveables; and so being in *commercio*, why should not the apparent heir's meddling therewith infer a *gestio pro herede*?"

Nor was this a decision in *apicibus juris*, or at all beyond the solid principles which have been held to obtain. For Dirleton, whose *Doubts* were said by a late Great Judge to be "better than most people's certainties," gives us a very satisfactory opinion upon the subject, *voce Behaving as heir*. "Quæ ratio, that the owning a title of honour, and sitting in parliament, doth not import *behaving as heir*, and yet the owning and intromitting with a sword, or armour, or any thing else, will import *gestionem*? Answer, That creditors being to be satisfied out of the goods and estate belonging to a defunct debtor; if the appearand heir doth meddle with any part of the same, *eo ipso adiit passivè, quia miscet se rei* which should be liable to the executor's execution. But a title of honour is not such an interest as could be any way liable to the creditor, and the appearand heir, in owning the same, *non libat hereditatem*."

And Sir James Steuart observes, "The owning a title of honour, and sitting thereby in parliament, doth not impart *behaving as heir*, though the intromission with any part of the moveable heirship would do it. And the reason is, that honour transmits by the blood, and not by service, and creditors can have no interest in it."

The court, in the decision last mentioned, justly considered the security

rity of creditors to be so much connected with the law of passive titles, that it might be very fatal to the country, should that law be thrown loose upon arbitrary circumstances; therefore it was that so small an article was thought worthy of the consideration of the whole Lords, and its relevancy allowed, by its being made the subject of a solemn reference to the oath of a Noble Earl.

The body-clothes of Patrick Smith were surely, upon a comparison between the parties, more valuable to the defender Robert Armour, than his father's parliamentary robes were to the Earl of Seaforth: and it is proved to your Lordships, that Robert Armour did not only intromit with, but actually wear and use Patrick Smith's body clothes.

Your Lordships will surely allow a decision of the English Judges who sat on our bench in Oliver Cromwell's time, to have more than ordinary weight upon this point; because it has been universally acknowledged by the unprejudiced and impartial, that decisions pronounced by them, were invariably consonant to the law of Scotland in its strict and just sense. They did not allow themselves to make arbitrary distinctions upon points where the law was simple and positive, and admitted of none: but they pronounced the law upon every case, without respect to particular circumstances.

During the few years that they sat, they had occasion to give judgement upon a good many points of the law of Scotland; and on June 30. 1658, they determined this question of the passive titles, *Mr John Hay, Advocate, contra Gilbert Hay*; as your Lordships will see in the printed collection of their decisions. "Mr John Hay pursues Gilbert Hay for payment of a bond of 200 merks due by his father, as behaving himself as heir to his father; and condescends on the behaving; 1st, in so far as *he wore his father's best cloak*; 2dly, severally, in so far as he made use of his father's *best board, bed, clothes, fire, vessels, &c.* It was answered for the defender, to the first, The cloak is *res modica, et de minimis non curat lex*, and cannot infer *that odious passive title* to make the defender liable to all his father's debts. As to the other particulars, *imo, Non relevat*, unless that the defender had sold and disposed the said goods; but not by simple using thereof, which is only to be repaired and made up." Every argument therefore that can be urged in such a case was stated here; but the judges did not think themselves at liberty to assume a *dispensing power*, and apply the law or not, according as circumstances might strike them;

for

Decisions of
the English
Judges, June
30. 1658. Hay
contra Hay.

for thus they gave judgement : " The Commissioners found the
 " *first* condescendence, of *the cloak only*, relevant : Found the *second*,
 " *by using the bed and bed-clothes*, &c. by lying thereon, &c. rele-
 " vant, without necessity to alledge dispoised thereon."

It may perhaps be thought to favour too much of scholastic rea-
 soning to say, that every transgression against general utility is *eo*
ipso general. But, with submission, it is nevertheless an argument
 founded in truth and expediency ; and hence it is, that every un-
 warranted intromitter with the effects of a defunct debtor is to
 be held in law as *universally* liable. The defenders cannot now
 get their vitious intromission denied ; for the evidence of it stares
 them in the face, and confounds them : but they still harp upon
 this topic, that the intromission was only with very *small particu-*
lars. Your petitioner may fairly apply to them a lively compari-
 son of the celebrated Mr *Edmund Burke*, in the debate on the Spa-
 nish papers with regard to Falkland's island. " The arguments u-
 " sed by the gentlemen on the other side put me in mind of the
 " story of a girl who was brought to bed of a bastard child. The
 " fact being fully proved beyond the possibility of a denial, and
 " the disgrace plain, and not to be avoided, all she could say for
 " herself was, that the child was *but a very little one*."

But, *separatim*, supposing your Lordships should adopt this novel
 idea, That intromission with things of small value ought not to in-
 fer the passive title of *vitious intromission*, your petitioner begs leave
 to maintain, that your Lordships must, even upon pure principles
 of equity, have a due consideration to the station and circumstances
 of parties ; for there is no doubt, that what may be considered as
 things of small value in the case of people of high rank, ought not
 to be looked upon in that light in the case of mechanics, and o-
 thers, in such circumstances as the deceased Patrick Smith. Be-
 sides the uncertainty that would be occasioned, should such a lati-
 tude as contended for by the defenders be allowed, it must occur
 to your Lordships, that justice, which ought to be equally distri-
 buted to the poor and to the rich, would be altogether denied to
 people of inferior stations in a question upon the passive titles. In
 vain would they bring a proof against vitious intromitters with the
 effects of their defunct debtors ; they would be told, That the effects
 with which intromission was proved, were things of small value,
 and that therefore they could have no redress. The petitioner does
 maintain, That the defenders intromissions were, comparatively
 speaking, by no means with things of small value. They intro-
 mitted not only with the defunct's body-clothes, but with his

napery, with his sheets, his servits, and his table-cloths. In short, they intromitted with every thing on which they could lay their rapacious hands. Your Lordships see it in proof, that when the widow separated her share of the moveables from what belonged to the defunct, she proceeded with becoming caution and prudent regularity, doing nothing but in presence of Robert Armour the defender, as representing the defunct, — her own brother, as a friend upon her part, — and one of the magistrates of the place, — to see justice done between both parties. Your petitioner does maintain, that upon this occasion Robert Armour could appear in no other capacity than as representing the defunct; and accordingly your Lordships see, that the separation was made *by the consent of Robert Armour*.

Your Lordships see the defender Robert Armour strutting about through the town of Kilmarnock *spoliis indutus* of the defunct, very civilly wearing Patrick Smith's body-clothes, as if they were his own, whilst his creditors might seek their payment the best way they could. Then what a strong *animus immiscendi* did he show, when he became emboldened to such a degree, that he deliberately went to another house, where a press stood which belonged to the defunct, which press "was set there *in order to prevent it being poynded by his creditors*," and with all the confidence of a proprietor, carried it off? With great submission, there is no explaining away such a conduct. Nor can your petitioner allow himself to think, that the *color quaesitus* assumed by the defenders, will prevent the keen eye of justice from detecting their vitiosity. They intromitted as much as they could; and therefore, no thanks to them, had their intromissions been only with things of small value. After having done what they could, they cannot surely be freed from the penalty provided by the law in such cases; any more than a house-breaker, who, however violent his intrusion, and however industrious his search, has had the fortune to find but an inconsiderable booty, should, after apprehension and conviction, escape the gallows.

But why, with the greatest deference, should the intromissions of these defenders be held as inconsiderable, according to their circumstances, and to those of the defunct, when so much is proved, and so much clouded with dark presumptions of guilt? The defender Robert Armour, with a view of appearing mighty delicate and mighty conscientious, sets forth, "That he did not so much as put to his hand, or intermeddle, even for the pious purpose of burying the defunct, till he had obtained the warrant of a judge;

" judge ; so that he set out with the most ouvert acts of abstaining." It is very true that he had the art and cunning to apply by petition to the magistrates of Kilmarnock, and obtained warrant to roup as much of Patrick Smith's moveables as would defray the expence of his funeral. But this very proceeding affords a strong argument against him ; for from the inventory and roup-roll of Patrick Smith's effects, which is produced in process, it appears that the whole of this matter was the merest sham. Only a few poor articles of household-plenishing are to be found in it, although his house contained the furniture, not of an ordinary dwelling-house, but of an inn, where a greater quantity and variety of furniture is necessarily required. The widow swears, " That there would be about a boll of meal, and meal-seeds to the value of ten pecks of meal, which was in her husband's house at his death, and was left there when she got her part of the furniture ;" but not a grain is to be found in the inventory. It is Proof, p. 2. F. also proved, that the defunct had, at the time of his death, as much timber, as, with a few more fir-deals, would be "*as much as would serve him to work by himself for two years :*" yet the value of the timber in the inventory and roup-roll, amounts to a mere trifle, no more than L. 2 : 16 : 3 $\frac{1}{4}$. Very strange surely ! especially as it is in proof, that Robert Armour, this *pious son-in-law*, was himself a p. 2. K. dealer in timber. Nor have the defenders, even in the course of this process, been brought to confess their intromission with much more than the contents of the inventory and roup-roll above mentioned ; and therefore it is left to your Lordships to judge, what became of all the other effects proved to have belonged to the defunct. In a word, instead of stating the number and quantity of the effects with which these defenders did intromit, the question, with submission, should rather be, With what did they not intromit ?

The check given by the decisions of this court to vitious intromitters, has had a very happy effect, in preventing creditors from being hurt by what would otherwise be but too common ; and therefore your petitioner has not been able to find any decision upon the point of vitious intromission, in any of our later collections : but as evidence, that

" The law hath not been dead, tho' it hath slept,"

your petitioner begs leave to recall to your Lordships remembrance, a decision pronounced no farther back than the 2d of
December

Dec. 2. 1769. *December 1769, Margaret Telfer contra Janet Milmyne; where it having appeared, that Janet Milmyne did, without any authority, intromit with the effects of her deceased husband; although she raised a woeful clamour, representing the action brought against her upon the penal passive title of vitious intromission, as "most vexatious and oppressive;" and although it was pleaded for her, that the things with which she had intromitted were of small value, only one horse, two cows, two cuddocks, a crop valued at L. 3 Sterling, and a trifle of household furniture; that she had no bad intention; and "though in ruder and less civilized times, "the bare intromitting was sustained as sufficient to subject "in this penal passive title, the rigour of the law in this particular has been departed from for near a century past;" and that she had been left a widow with six children: notwithstanding all these suggestions and allegations, the Lord Hailes Ordinary decerned against her as a vitious intromitter. Nothing was left untried by her in this court, to escape from justice; the Lord Ordinary was earnestly addressed with representation after representation. But all in vain: for, as his Lordship was pleased to express himself in an interlocutor upon one of her representations, "he had no power to mitigate the rigour of the law from motives "of compassion." She reclaimed to the whole Lords; but upon advising her petition with answers, your Lordships were pleased, on*

*The intromission
was total, & the
left untried
it was by a
widow with 6
effects of her
deceased husband*

Dec. 2. 1769. *the 2d of December 1769, to adhere to the Lord Ordinary's interlocutor. And when the cause went back to the Lord Ordinary, his Lordship found her liable in the expence of the process. Against which interlocutor she also presented a representation; which his Lordship refused, "In respect that the defender's being ill advised in "defending, is no reason in law why the pursuer should not be in- "demnified for pursuing."*

Such is the recent sense of the court upon the doctrine of vitious intromission; and your petitioner flatters himself, that in this case also, the defenders will in the end be taught, that they have been "ill advised in defending." Although it could be shewn, that your Lordships have pronounced a few decisions, which may be interpreted as if the court had, in very particular circumstances, mitigated this law; still, with great submission, your petitioner would hope for success; because whatever decisions may be upon the one side, are much more than corrected by the decisions on the other side: and, at any rate, he does with all deference maintain, that as the law of vitious intromission is so well established as a part of the unwritten law

law of Scotland, and has been referred to as so established, by the legislature itself, nothing less than an act of the legislature can abrogate it. The utility of this law must be universally acknowledged; and as your Lordships have seen, that vitious intromitters have attempted to shelter themselves, by alledging, that there has been a great relaxation of the law, which, with submission, is, in other words, having the assurance to come and tell your Lordships, that you have deviated from the law, there is the greater reason for your Lordships being as strict as possible, in order to prevent so licentious and dangerous a notion from gaining ground in the country.

Your petitioner has thus humbly endeavoured to persuade your Lordships of the justice of his cause; and if his anxiety has made him detain the court too long, he hopes the general importance of the subject will serve as an excuse for him. In placing the subject in various points of view, and introducing every thing that he imagined would throw light upon it, he has had in his eye the example mentioned by my Lord Fountainhall, in his most instructive and entertaining collection of decisions, vol. 2. p. 717, where it is said, that one "may brighten and illuminate a cause by various illustrations and parallels."

If this petition shall be thought worthy of an answer, the defenders will, no doubt, come before your Lordships with a plaintive tone, and urge affected claims of compassion, on account of their low situation in life, their ignorance, and their having no bad intention. But their situation in life is not so abject, nor their ignorance so great, as they would pretend: for the danger of *vitious intromission* is well known to all our common people, as every one who has had occasion to hear them upon their affairs, must have observed; and the defenders gave an undeniable proof, that they were not ignorant of this danger, by their application to the magistrates of Kilmarnock for a warrant to sell the effects of the defunct, the proceedings in consequence of which have already been noticed. Your Lordships also will not fail to remark the strong suspicions which attend the conduct of the defenders, particularly since they thought proper to claim a preference in virtue of that bond, the history of which shall not now be repeated, but by which your petitioner would be materially hurt. These suspicions render them intitled to no favour, and fully justify your petitioner in insisting to have the law applied.

But be these things as they may, your Lordships will not forget,
I
that

that *ignorantia juris neminem excusat*; as such an excuse would be perpetually assumed: And as *cogitationis penam in foro nemo patitur*, so neither will an alledged innocence of intention be sustained to justify, in a court which sits to pronounce judgement upon external acts. The stern dignity of law cannot bend to such pretences; for in the noble definition of it by *Demosthenes*, quoted by *Marcianus*, in l. 2. D. *De Legibus*, we find amongst its characters, *Ἐπ' ἀνθρώποις δὲ τῶν ἰκνύμενων καὶ ἀκούστων ἀμαρτήματων*.

But indeed there is an impropriety in mentioning motives of compassion to *Judges*, by whom, as it is elegantly expressed in l. 11. D. *De penis, Nec severitatis aut clementie gloria affectanda est*. Your petitioner would think it indecent to suppose that judges would determine *aut durius aut remissius* than is prescribed to them by the law. He is asking no more from your Lordships than to pronounce what appears to him to be the law of his country, in favour of a creditor who has proved vitious intromission with the effects of his deceased debtor. Your Lordships have the honour to sit as the guardians of our law, and your petitioner persuades himself, that the people of Scotland shall never have to say in the words of the Roman Orator, *Sub judicum potestate cadunt leges*.

May it therefore please your Lordships, to alter the Lord Ordinary's interlocutor, and in respect that the defenders have incurred the passive title of vitious intromission, to decern in terms of your petitioner's libel.

According to justice, &c.

JAMES BOSWELL.

